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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 451

WILLIAM W. MINER, JOHN H. N. POTTER, S. BAKER WILLIAMS, ET AL.,
Petitioners,

v.

COMMERCE OIL REFINING CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Statement

In this case federal jurisdiction rests solely on diversity of citizenship. Petitioners are here because of their disagreement with the unanimous holding below that petitioners' evidence failed to meet the high standard of proof required by settled Rhode Island law to sustain the granting of an injunction against the operation of an oil refinery which has not yet been built.

In this action petitioners requested extraordinary relief. It was extraordinary not only in the usual sense that injunctive relief was sought against another's lawful use of his property. Here relief was sought not against any actual harm which had already befallen petitioners or against any existing nuisance, but anticipatorily before the operation of

respondent's refinery had begun and even before one spade full of dirt had been removed from the ground for its construction.

The essence of the unanimous decision below, of which review is sought, was that "* * * in the exercise of our appellate duty to examine the [petitioners'] evidence to see whether it meets the high standard of proof required by the Rhode Island law * * * we feel constrained to hold that the Court below erred in enjoining erection of the [respondent's] refinery as a prospective nuisance. * * * on the relatively even balance of the sharply conflicting expert testimony in the record before us, we think the Supreme Court of Rhode Island would wait to see whether the refinery constituted a nuisance when put into operation." (Appendix A to Petition, p. A46).

The issues on which the action was tried—all issues of state law relating either to the common law doctrines of nuisance or to local laws of zoning and municipal regulation—were raised in counterclaims of the petitioners for a judgment declaring the invalidity of certain zoning, building and licensing ordinances of the Town of Jamestown, Rhode Island and enjoining the proposed construction and operation of the refinery (Record, Volume III, pp. 18-40, 44-52, 58-59). Respondent was originally the plaintiff, the complaint having alleged a conspiracy by petitioners to prevent respondent from erecting and operating its proposed refinery. Respondent decided not to offer evidence in support of the complaint but to try the action on the issues raised in the counterclaims, and accordingly, the complaint was dismissed at the opening of the trial. In effect, therefore, the roles of the parties were reversed. The petitioners, originally defendants, were in fact the plaintiffs below.

The District Court granted judgment for the petitioners, declaring the local ordinances and respondent's license to be invalid and enjoining the operation of the proposed refinery (Appendix A to Petition, pp. A1-A27). According to the

research of both parties of the reported cases on the subject, the District Court's decision marked the first time that an anticipatory injunction had been granted in a case controlled by the requirements of Rhode Island law set forth in *Otto Seidner, Inc.* v. *Ralston Purina Co.*, 67 R. I. 436, 24 A. 2d 902 (1942) (a case in which the Rhode Island Supreme Court reversed the granting of such an anticipatory injunction). The District Court's decision also marked the first time in the history of American jurisprudence that such an anticipatory injunction had been granted prohibiting *in toto* the merely contemplated operation of an oil refinery.

On the basis of Rhode Island law, the Court of Appeals for the First Circuit unanimously reversed with instructions to enter judgment dismissing the petitioners' counterclaims (Appendix A to Petition, pp. A27-A46). Its reasoned opinion fully discusses the detailed, and at times conflicting, expert testimony with respect to the probable effects of the proposed refinery. It sets forth clearly the uncontradicted proof as to the overwhelming sentiment of the Jamestown community in favor of the refinery and the many engineering steps taken by the respondent to insure the safety of its residents.

To place in proper perspective all of the technical testimony favorable to petitioners which they have picked and chosen from the record and pieced together in their Petition, we need only to make a brief reference to the testimony of Dr. Benjamin Brooks, a consulting chemical engineer experienced in refinery operations, whose qualifications are undisputed for he appeared at the trial as an expert witness called by and for the petitioners (Record, Volume I, pp. 122t-125t). Dr. Brooks had previously been retained by the Town Council of Jamestown to advise on the subject of oil refineries and the safeguards which should be included in the local ordinances (Record, Volume II, p. 893t).

Dr. Brooks presented to the Town Council, prior to its legislative action, a detailed report, which discussed and explained the problems involved and contained recommendations with respect to the safeguards necessary to insure the protection of the residents of Jamestown from the possibility of air and water pollution (Record, Volume III, pp. 260-267, Ex. R-1). This report, ignored by the District Court in the same manner as it was studiously omitted from the Petition to this Court, said (Record, Volume III, pp. 260-261, Ex. R-1):

> "Many refineries are located adjacent to or near occupied areas and in recent years such plants, in all cases that I know of, have installed means by which atmospheric and water pollution has been eliminated substantially completely, at least to the extent that complaints of such pollution are very rare and then are usually the result of an accident of some kind.
> * * *
>
> The general experience has been that the operation of effective safeguards against atmospheric and water pollution has been profitable to the refineries and has been beneficial to the health and increased safety of the refinery workers. This has been so clearly demonstrated that any well planned and well operated refinery today would install such corrective measures as a matter of self interest, entirely aside from potentially costly suits which could result from a variety of causes if such precautionary measures were not taken."

At the trial Dr. Brooks adopted his report (Record, Volume III, pp. 260-267, Ex. R-1) as his professional opinion (Record, Volume I, p. 185t) and with refreshing candor testified that (Record, Volume I, p. 137t):

> "A. Any time that I have ever smelled bad odors from a refinery, I naturally assume that it is an accident, because I have visited the same refineries at other times and don't smell these odors. I know it is

possible to run a refinery with almost complete elimination of odors. * * *

Q. At what distance from a refinery have you experienced such odors? A. That is pretty hard to say. I am trying to keep this to modern, well-equipped refineries, and that makes it a little difficult because they are under much better control. Of course, these odors, in case they do get out into the atmosphere, can be carried for some distance. My difficulty is in recalling some particular incident in a modern refinery. I can't recall any such case."

With that brief reference to more than 5,000 pages of testimony, including that of some 24 expert witneses, we shall pass immediately to discussion of the only question at hand—whether this ordinary action for an injunction under state law merits the attention of this Court.

Reasons for Denying the Writ

I.

THE UNANIMOUS HOLDING OF THE COURT BELOW THAT THERE WAS NO OCCASION FOR IT TO PASS UPON THE VALIDITY OF THE LOCAL ORDINANCES INVOLVED WAS NOT A DEPARTURE FROM, BUT WAS STRICTLY IN ACCORDANCE WITH, THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND TIME HONORED RULES OF SUBSTANTIVE LAW AND APPELLATE PROCEDURE.

Petitioners' first and main reason for seeking review (Petition, pp. 2 and 32) is based upon the Court of Appeals holding that there was no occasion for it to pass upon the validity of the local zoning, building and licensing ordinances or of respondent's license granted thereunder in deciding whether the injunction below was proper, and that there had been no occasion for the District Court to do so. (Appendix A to Petition, pp. A30-A34). The rationale of

that holding was the determination of the Court of Appeals that under Rhode Island law (a) the license granted respondent would be no defense to it if respondent in fact created a nuisance injurious to petitioners, (b) that compliance with the challenged zoning ordinance likewise would not protect respondent from the consequences of creating a nuisance and (c) that compliance with the local building ordinance similarly would afford respondent no protection if it used its property in such a manner as to constitute an unreasonable interference with petitioners' enjoyment of their properties. Thus the Court of Appeals concluded that "Since, even if valid, neither the plaintiff's license nor the amendment to the local zoning and building ordinances would provide the plaintiff with a defense to the charge of constructing a private nuisance, it follows that there was no need for the court to pass on the validity of the ordinances, for decision of that matter was unnecessary to its disposition of the case." (Appendix A to Petition, pp. A33-A34)

Petitioners argue that this holding was a far reaching departure from the accepted and usual course of judicial proceedings, but they cite no cases in support of that premise. They attempt to bolster the argument by the contention that the mere alleged invalidity of the local ordinances, apart from any question of the maintenance of a nuisance, constituted an "independent cause of action", but again cite no case for such a novel position. In fact, a reading of the allegations of the counterclaims as to the invalidity of the local ordinances and action taken thereunder reveals that these allegations do not constitute a claim for relief separate from the alleged claim for relief based upon nuisance. Indeed, it seems clear that petitioners did not so consider these allegations, for they are not set forth as separate and independent causes but are commingled with the allegations as to nuisance in but one single claim for relief. (Record, Volume III, pp. 22-25, 49-52).

There is, moreover, a simple and obvious defect in this entire contention, which at once reveals the correctness of the decision below and the error of the District Court.

The sole effect of the District Court's declaration of invalidity of the original Jamestown zoning ordinance and the amendment thereto was to leave respondent free to build its refinery at any place in Jamestown and not to confine it to the "refinery use district", which the amendment to the zoning ordinance had set aside for refinery purposes, for the declaration of invalidity struck down all zoning ordinances of the Town of Jamestown. Thus the declaration of invalidity of the zoning ordinance and the amendment thereto settled no controversy and determined no legal rights among the parties. The same was true with respect to the declaration of invalidity of the licensing ordinance and respondent's license thereunder—the effect of the declaration would be that respondent needs no license to operate its refinery.*

Similarly, the declaration of invalidity by the District Court of the amendment to the Jamestown building ordinances settled no controvery and determined no rights among the parties. The sole effect of that declaration was that respondent in constructing its refinery would have nad to comply with the provisions of the building ordinance in its original form. (Record, Volume III, pp. 294-314, Ex. CC).**

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*A question is raised as to the standing of petitioners to challenge the validity of the licensing ordinance, which did them no harm, but rather was enacted for their protection and benefit. The licensing ordinance was restrictive of the rights only of respondent and anyone else desirous of operating an oil refinery in Jamestown. The record is barren of proof that any petitioner desired to do so and therefore was restricted in his rights. *Town of Lexington* v. *Bean*, 272 Mass. 547, 172 N. E. 867 (1930).

**The Town of Jamestown, although not a party to this litigation, did file a brief as *amicus curiae* in the Court of Appeals in support of respondent's contention that the District Court should not have passed upon the validity of the Town's ordinances and respondent's license granted thereunder.

The reversal by the Court of Appeals of the District Court's declaration of invalidity of these local ordinances was therefore quite proper, for that declaration was academic, and it is well-settled that a declaratory judgment should be entered only if it will settle a controversy and determine the legal rights of the parties. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239-41 (1937); 6 Moore, *Federal Practice* 3032, par. 57.08(4).

The action of the Court of Appeals was thus well within the time-honored concept that a court should refrain from the determination of issues unnecessary to decision of the case. See *Glasgow* v. *Baker*, 128 U. S. 560 (1888). In any event purely local questions concerning local ordinances and actions taken thereunder do not merit the attention of this Court.

II.

THE UNANIMOUS DECISION OF THE COURT OF APPEALS ON A QUESTION OF RHODE ISLAND LAW PRESENTS NO QUESTION WARRANTING REVIEW BY THIS COURT.

Another of petitioners' contentions—"the third question presented"—is that "the court below committed another error requiring review, viz., the decision of an important state question contrary—in every significant respect—to applicable state law" (Petition, pp. 3 and 37). A question of state law does not, of course, merit review by this Court. As this Court has indicated on many occasions, in this area it defers to the decision of the Court below, unless that Court's conclusion is shown to lack a rational basis. For example in *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 708 (1949) this Court said:

> "* * * It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under the circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

And we shall show that the decision below, unanimously concluding that petitioners had failed to sustain their burden of proof, was the result of a reasonable and rational application of well-settled Rhode Island law.

As the Court of Appeals held and all concede, *Otto Seidner, Inc. v. Ralston Purina Co.*, 67 R. I. 436, 24 A. 2d 902 (1942), sets forth the rules of law controlling in this case. The *Seidner* case is discussed in such detail in the opinion below that any extensive discussion of it in this brief is unnecessary. (Appendix A to Petition, pp. A43-A46)

It is clear that the *Seidner* case sets forth an extraordinary burden of proof—a burden which the petitioners had to meet to support their prayer for an anticipatory injunction against the merely proposed construction and operation of the refinery. That burden may be summed up as requiring (1) "clear and convincing" proof that the results prophesied by some of petitioners' witnesses were (2) "practically certain" to happen to the (3) substantial damage of the petitioners. The concession appearing many times in the Petition that the evidence was "conflicting" (see, e.g. Petition, pp. 3, 34, 37) is enough to demonstrate the failure of petitioners' proof to come up to this high standard, for the corollary of the *Seidner* rule has been stated as follows:

> "Generally, the Court ought not to interfere, where the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized". ("Right to Enjoin Threatened or Anticipatory Nuisance", 7 A.L.R. 749, 757.)

It is therefore obvious that it was a reasonable and rational application of the Rhode Island law which led the Court of Appeals to conclude that:

> "* * * in the exercise of our appellate duty to examine the defendants' evidence to see whether it meets the high standard of proof required by the Rhode Island law as stated and applied in the *Seidner* case, we feel constrained to hold that the court below erred in enjoining erection of the plaintiff's refinery as a prospective nuisance. Standing in the shoes of the Supreme Court of Rhode Island, that is to say, applying the Rhode Island rule to the evidence and the findings in this case as we believe the Rhode Island court would apply its rule, it seems to us from the *Seidner* case that the Supreme Court of Rhode Island would not sanction enjoining the erection of the plaintiff's refinery in Jamestown. Instead, on the relatively even balance of the sharply conflicting expert testimony in the record before us, we think the Supreme Court of Rhode Island would wait to see whether the refinery constituted a nuisance when put into operation." (Appendix A to Petition, p. A46)

The correctness of the Court of Appeals' interpretation of the Rhode Island law is fortified by what we believe to be the most recent declaration by the Rhode Island courts on this subject, and of course the interpretation of a rule of state law by the state court is of paramount importance. In *Collins* v. *Vallone* (Superior Ct., R. I., Newport County, Eq. No. 3511, February 24, 1959 (not reported), aff'd. sub nom. *Nugent ex rel. Collins* v. *Vallone* — R. I. —, 161 A. 2d 802 (1960), an action related to this one in that it was there sought to enjoin the erection of this respondent's crude oil and products dock facilities in Jamestown, the *Seidner* case was construed by the Superior Court to mean:

> "* * * under the so-called anticipatory doctrine of nuisance, that the complainant must show that the structure in and of itself is a nuisance, not that it may become a nuisance, not that in the modus operandi it might become a nuisance, but that it is in fact a nuisance. . . . [and that a court] . . . should first permit the object to breathe, and then after it has been given life, then determine whether or not it might or might not become a menace * * *".

The lower court was unanimously affirmed by the Supreme Court of the State of Rhode Island.

III.

THE CAREFUL REVIEW OF THE RECORD BY THE COURT BELOW WAS PROPER UNDER THE APPLICABLE RHODE ISLAND SUBSTANTIVE LAW AND WAS IN ACCORDANCE WITH THIS COURT'S INTERPRETATION OF RULE 52(a).

A further complaint of petitioners (Petition, pp. 3 and 33—"The second question presented"—) is that the Court of Appeals erred in giving careful consideration to the record in order to determine whether the ultimate findings of the District Court were supported by the quantum of proof necessary under Rhode Island law to sustain the granting of anticipatory injunction. The Court of Appeals, of course, was under a well established duty to look carefully at the record to determine whether petitioners had sustained their burden of proof. The criteria for review in cases such as this one is not only set forth in the Rhode Island law but has been enunciated by this Court and the Courts of Appeals for several of the Circuits.

In the *Seidner* case, the Supreme Court of Rhode Island looked beyond the trial court's findings and, upon a full re-

view of the record, held that the conflicting opinion evidence was insufficient to warrant the drastic remedy of anticipatory injunction and, accordingly, reversed the trial court. The Court of Appeals did no more in this case, and the rules of the *Scidmer* case with respect to the law of anticipatory nuisance and the burden of proof, being rules of substantive law, were binding on the District Court under the *Erie* v. *Tompkins*, 304 U. S. 64 (1938) doctrine, and accordingly were binding on the Court of Appeals on its review. *Palmer* v. *Hoffman*, 318 U. S. 109 (1943); *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208 (1939). This Court, in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 446 (1959) said:

> "* * * Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' * * *".

and the Court below had said in *Sampson* v. *Channell*, 110 F. 2d 754, 758 (1st Cir. 1940):

> "* * * The incidence of burden of proof may determine the outcome of the case. . . . Assuming the state rule to be one way and the federal rule the other, then the accident of citizenship becomes decisive of the litigation. The situation seems to call for the application of the rule in the Tompkins case. There is no important counter-consideration here, for the state rule can be easily ascertained and applied by the federal court without any administrative inconvenience. * * *"

The rule of the *Scidmer* case with respect to the quantum of proof required in this anticipatory nuisance case therefore constituted the criterion which the Court of Appeals was required to follow.

Certainly, and contrary to petitioners' interpretation, Rule 52(a) of the Federal Rules of Civil Procedure does not preclude a federal appellate court from examining the evidence to determine whether the burden of proof has been met. This Court has many times considered the proper

interpretation of Rule 52(a) and there is nothing in this case which would call upon this Court to speak again on that subject. The action of the Court of Appeals in this case was well within and in accordance with this Court's holding in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), where this Court held that a finding is:

> "* * * 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In that same case, a crucial finding was held by this Court to be clearly erroneous "despite the opportunity of the trial court to appraise the credibility of the witnesses * * *". (333 U. S. at p. 396).

And, in addition, it must be borne in mind that, in reviewing this case, Rule 52(a) had to be applied in the light of the fact that, under Rhode Island law, the quantum of proof necessary to sustain the finding and judgment was far greater than a preponderance of the evidence.

Thus review of this case was also influenced by the rule which the Court below had previously recognized in *Brenci* v. *United States*, 175 F. 2d 90, 94 (1st Cir. 1949), where it noted its obligation in cases where a special quantum of proof was required "to examine the evidence to see if it meets this high standard." The requisite in the *Brenci* case was that the proof be "clear, unequivocal, and convincing". (175 F. 2d at p. 92) and in this case the rule set forth in the *Scidner* case was that the evidence "show clearly and convincingly" that substantial damage would "be practically certain" to result.

That same rule on review was applied by this Court in *Schneiderman* v. *United States*, 320 U. S. 118 (1943), and in *Baumgartner* v. *United States*, 322 U. S. 665 (1944), where this Court, notwithstanding Rule 52(a), looked be-

yond the findings of fact on the record and thereupon reversed judgments of District Courts which had been affirmed by Courts of Appeals in cases where, like the present one, the law required a particularly stringent standard of proof. This Court said in the latter case (at p. 670):

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. * * * But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U. S. 118. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal. We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

The Court of Appeals in this case thus did no more than this Court would have done. Another excellent statement of this rule on review is found in *Soccodato* v. *Dulles*, 226 F. 2d 243, 246 (D. C. Cir. 1955), where the Court of Appeals, in reversing the District Court's findings, expressly recognized the distinction between the application of the "clearly erroneous" rule in a case such as the instant one and in the ordinary case where the burden of proof required is a mere preponderance.

Finally, the truly short and complete answer to petitioners' argument in this regard is that it is based on the erroneous assumption that the Court of Appeals' opinion improperly overturned "findings of fact" made by the District Court, whereas the Court of Appeals' opinion proceeds on the basis of applying Rhode Island law to those

findings. The Court of Appeals specifically prefaced its holdings as to the effect of Rhode Island law by saying: "With the evidence as summarized above and the findings of the District Court in mind, we now turn to the applicable law, which, of course, is the law of Rhode Island" (Appendix A to Petition, pp. A41-A42), and again by saying "* * * applying the Rhode Island rule to the evidence and the findings in this case * * *" (Appendix A to Petition, p. A46). Moreover, it is over-simplification to refer to the conclusions of the District Court as to the probable effects of the operation of the refinery as "findings of fact".

In this case involving a refinery still in blue-print, most of the so-called findings necessarily were matters of prophecy and opinion. As this Court said in the *Baumgartner* case, *supra*, "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. * * *" (322 U. S. at p. 670) That the Court of Appeals was well aware of this is made evident in its decision in the *Brenci* case, *supra*, where it pointed out that a distinction exists between evidentiary facts of an objective nature and ultimate facts upon which appellate courts are obligated to make their own judgments (175 F. 2d at p. 94). See 5 Moore, *Federal Practice* 2015. The Petition herein itself recognizes this rule by acknowledging the distinction between the "detailed findings of fact" made by the District Court before it "concluded with the ultimate finding" (Petition, pp. 29, 37). Such recognition encourages us to quote from *United States* v. *One 1950 Buick Sedan*, 231 F. 2d 219, 223 (3rd Cir. 1956) as follows:

> "The appellees have urged that this court cannot upset the district court's findings on facilitation and probable cause unless those findings are clearly erroneous. But we are not here bound by Rule 52(a) of the Federal Rules of Civil Procedure. As we said in Sears, Roebuck & Co. v. Johnson, 3 Cir., 1955 219 F. 2d 590, 591.

> "* * * In disturbing a district court's findings of basic facts, this court is guided by the "clearly erroneous" provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (i.e., ultimate fact) should reasonably be derived from the basic facts.'
>
> This court by examining the basic facts found by the district court can determine as advantageously as the district court can whether or not a reasonable inference can be drawn from the basic facts that the car facilitated the transportation and sale of narcotics, and that probable cause existed."

The Court of Appeals did not misread Rule 52(a). It did not render a decision in conflict with any of this Court or of any other Court of Appeals. It was bound under Rhode Island law and the Federal Rules to give the evidence below the careful review which it did in order to fulfill its appellate duty. It did nothing to merit this Court's giving attention to a purely local dispute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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